STATE OF MICHIGAN

COURT OF APPEALS

MARSHA INLOES and WILLIAM H. INLOES,

Plaintiffs-Appellants,

v

LARRY ALTON, D.O., MONTROSE CLINIC, DEBRA JOHNSON, C.N.P., and MICHAEL F. SUGG, D.O.,

Defendants,

and

MCLAREN REGIONAL MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
May 19, 2005

No. 253841
Genesee Circuit Court
LC No. 01-070121-NH

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant McLaren Regional Medical Center. We affirm.

I. Facts and Procedure

In this medical malpractice suit, plaintiffs allege that defendants' failure to properly treat plaintiff Marsha Inloes on October 15, 1998, caused her to suffer an acute cerebral vascular accident (i.e., a stroke). On October 4, 2000, plaintiffs filed a notice of intent to file a claim pursuant to MCL 600.2912b(1).[1] On April 16, 2001, the last day of the applicable two-year

[1] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility

(continued…)

limitations period,[2] MCL 600.5805(6),[3] plaintiffs filed their complaint. But instead of filing an affidavit of merit with the complaint as required by MCL 600.2912d,[4] plaintiffs filed a petition to extend the time for filing the affidavit by twenty-eight days. The trial court granted plaintiffs' petition, but did not sign the order granting the extension for filing the affidavit until April 21, 2001. On May 17, 2001, plaintiffs filed three affidavits of merit. On April 9, 2003, the trial court granted McLaren Regional's motion for summary disposition based on plaintiff's failure to file an affidavit of merit within the statute of limitations.[5]

II. Analysis

A. Standard of Review

Decisions regarding summary disposition are reviewed de novo. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). "In the absence of disputed facts, whether a cause of action is barred by the statute of limitations is a question of law that is reviewed de novo." *Ward v Rooney-Gandy*, ___ Mich App ___; ___ NW2d ___ (Docket No. 250174, issued March 22, 2005), slip op at 2. The trial court's order indicates that summary disposition was granted under MCR 2.116(C)(8) (failure to state a claim). However, because the trial court relied on the statute of limitations as the basis for dismissal, the applicable subrule is MCR 2.116(C)(7) (claim barred by the statute of limitations). *Waltz*, *supra* at 647. Where summary disposition is granted under the wrong subrule, the defect is not fatal and does not preclude appellate review where, as here, the record permits review under the correct subrule. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997).

> "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual

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> written notice under this section not less than 182 days before the action is commenced.

[2] The parties agree that the applicable statute of limitations period expired on this date.

[3] MCL 600.5805(6) provides:

> Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

[4] MCL 600.2912d provides, in pertinent part:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

[5] This Court previously dismissed plaintiffs' claims against defendants Alton and Montrose Clinic for the same reason. *Inloes v Alton*, unpublished order of the Court of Appeals, entered February 3, 2003 (Docket No. 244096).

> allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." [*Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997), quoting *Baker v DEC Int'l*, 218 Mich App 249, 252-253; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247; 580 NW2d 894 (1998).]

B. Discussion

Plaintiffs argue that the trial court erred in granting McLaren Regional's motion for summary disposition based on the expiration of the statute of limitations. To properly commence a medical malpractice action, a plaintiff must file both a complaint and an affidavit of merit. *Mouradian v Goldberg*, 256 Mich App 566, 571; 664 NW2d 805 (2003); MCL 600.2912d. Plaintiffs maintain that because the statute of limitations was tolled, the limitations period did not expire before they filed their affidavits of merit. Plaintiff first argues that the statute of limitations was tolled because Marsha Inloes was insane within the meaning of MCL 600.5851(1). We disagree. MCL 600.5851(1) provides, in pertinent part:

> [I]f the person first entitled to make an entry or bring an action under this act is . . . insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

Insanity for purposes of this statute is "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." MCL 600.5851(2). The insanity must exist at the time the claim accrues, not come into existence after the claim has accrued. MCL 600.5851(3). In order to avoid summary disposition under MCL 2.116(C)(7), the plaintiff must submit documentary evidence that creates a question of fact with respect to whether the plaintiff was deranged at the time his claim accrued. *Asher v Exxon Co, USA*, 200 Mich App 635, 641; 504 NW2d 728 (1993).

Here, although plaintiffs submitted evidence indicating that Marsha Inloes was experiencing various physical symptoms, was crying, and was nonverbal on October 15, 1998, the date of the allegedly negligent treatment by defendant McLaren Regional, plaintiffs' evidence failed to establish an issue of fact concerning whether she had a condition of mental derangement such as to prevent her from comprehending her rights. Thus, plaintiffs failed to show that the statute of limitations was tolled by MCL 600.5851.

Plaintiffs also argue that the statute of limitations was tolled because they filed a petition to extend the time for filing an affidavit of merit before the expiration of the limitations period and the court later granted the extension. We disagree. It is not the mere filing of a motion to extend time that tolls the period of limitation. *Young v Sellers*, 254 Mich App 447, 451; 657

NW2d 555 (2002), citing *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 692; 625 NW2d 470 (2001). Rather, it is the granting of such a motion that tolls the period of limitation. *Barlett, supra* at 692-694. Therefore, the statute of limitations was not tolled by the mere filing of plaintiffs' petition on April 16, 2001, the last day of the limitations period. Because plaintiffs failed to properly commence their lawsuit within the period of limitation by filing an affidavit of merit or obtaining an order granting an extension of time to file such an affidavit,[6] the trial court properly determined that plaintiffs' suit was barred by the statute of limitations.[7] *Id.* at 693-694.

Finally, plaintiffs argue that the period of limitation should be extended under the doctrine of equitable tolling. We disagree. The doctrine of equitable tolling should only be invoked in rare circumstances to prevent injustice and provide the plaintiff with his day in court. *Ward, supra* at 4. "Equitable tolling has been applied where 'the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.' " *Ward, supra* at 3, quoting 51 Am Jurisdiction 2d, Limitation of Actions, § 174, p 563. Equitable tolling has also been applied where the plaintiff's failure to file an affidavit of merit within the limitations period was due to a clerical error of attaching the wrong affidavit to the complaint, *Ward, supra* at 4, or understandable confusion about the legal nature of his claim, rather than negligent failure to preserve his rights, *Bryant v Oakpointe Villa Nursing Center*, 471 Mich 411, 432; 684 NW2d 864 (2004). The present case involves none of these circumstances. Further, plaintiffs filed their affidavits of merit on May 17, 2001, which was more than twenty-eight days after the expiration of the period of limitation. "A plaintiff must exercise reasonable

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[6] Although the trial court signed an order granting plaintiffs' motion to extend the time for filing an affidavit of merit by twenty-eight days, it did not sign this order until the period of limitation had expired.

[7] We note that this result is consistent with this Court's peremptory order in Docket No. 244096, where this Court reversed the trial court's order denying summary disposition to defendants Alton and the Montrose Clinic and held that these defendants were entitled to dismissal of plaintiffs' lawsuit:

> Plaintiffs' petition to extend time for filing an affidavit of merit did not toll the running of the limitations period for their medical malpractice action. *Barlett v North Ottawa Community Hospital*, 244 Mich App 685; 625 NW2d 470 (2001). The circuit court's order granting the extension of time was not entered until after the limitations period had run. Plaintiffs' medical malpractice action is barred by the statute of limitations, so defendants are entitled to dismissal of plaintiffs' complaint. *Scarsella v Pollack*, 461 Mich 547; 607 NW2d 711 (2000). [*Inloes v Alton*, unpublished order of the Court of Appeals, entered February 3, 2003 (Docket No. 244096).]

Although the parties do not discuss the issue, the law of the case doctrine militates against deciding this question differently in this appeal. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995).

diligence in investigating and bringing his claim. *Ward*, *supra* at 3. We conclude that this is not one of the rare cases were equitable tolling is appropriate to extend the limitations period.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette